

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TENTH STREET BUILDING
CORPORATION,

Plaintiff

vs.

BP PRODUCTS NORTH AMERICA,
INC. f/k/a and successor to BP OIL
COMPANY f/k/a and successor to
BORON OIL COMPANY and DONALD
TRAPP,

Defendants

) Docket No. 03-359
) (Judge Maurice B. Cohill, Jr.)
)
) ELECTRONICALLY FILED PLEADING
)
) JOINT RESPONSE OF PLAINTIFF AND
) DEFENDANT BP PRODUCTS NORTH
) AMERICA TO MOTION FOR
) RECONSIDERATION AND MOTION TO
) DISMISS FILED ON BEHALF OF
) DEFENDANT DONALD TRAPP
)
) Filed on behalf of: Plaintiff, Tenth Street
) Building Corporation and Defendant, BP Oil
) Company
)
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**JOINT RESPONSE OF PLAINTIFF AND DEFENDANT BP PRODUCTS
TO MOTION FOR RECONSIDERATION AND MOTION TO DISMISS
FILED ON BEHALF OF DEFENDANT DONALD TRAPP**

I. INTRODUCTION

On September 7, 2005, the Court entered an Order granting the joint motion of plaintiff and defendant BP Products North America, Inc. to lift the stay of this case imposed by the Court on February 28, 2005. Defendant Donald Trapp has filed a Motion for Reconsideration of the Court's Order of September 7, 2005 and a Motion to Dismiss this case. For the following reasons, Trapp's motion should be denied.

II. PROCEDURAL HISTORY

Plaintiff, Tenth Street Building Corporation ("TSBC"), commenced this action against BP Products North America, Inc. ("BP") and Donald Trapp ("Trapp"), in the Court of Common Pleas of Erie County, Pennsylvania, on September 17, 2003. TSBC's Complaint asserted claims for damages under the Resource Conservation Recovery Act, 42 U.S.C. §§6901, et seq., and state law. BP removed the action from state court to this Court pursuant to 28 U.S.C. §§1446(a), 1331 and 42 U.S.C. §6972(a). During the pendency of this action, TSBC submitted a claim for reimbursement of environmental corrective action costs to the Pennsylvania Underground Storage Tank Indemnification Fund ("USTIF"). The parties have been awaiting a determination by the USTIF concerning what, if any, remediation costs for contamination to the subject premises may be subject to reimbursement by the USTIF.

Believing that the USTIF's determination may facilitate settlement of this case, the parties jointly requested a stay of the proceedings, which request was granted by Order of this Court on November 12, 2003. The stay was to expire on January 23, 2004, unless previously terminated. According to this Court's Order of November 12, 2003, the defendants

were to file an Answer or other response to TSBC's Complaint within twenty (20) days after January 23, 2004 or, in the event the stay were to be lifted prior to that date, then within twenty (20) days after service of notice of the lifting of the stay. The original stay expired on January 23, 2004. Rather than requiring the defendants to respond to the Complaint as of the expiration of the stay, the parties again moved the Court for a further stay, which the Court granted. On February 28, 2005, the Court sua sponte entered a further stay of this action through August 1, 2005.

On September 1, 2005, the Court entered an Order directing that either a motion to lift the stay or stipulation for dismissal be filed no later than September 9, 2005. On September 6, 2005, TSBC and BP filed a joint motion to lift the stay and to require the filing of a response to the Complaint by defendants by September 26, 2005. This Court granted the motion to lift the stay on September 7, 2005.

III. DISCUSSION

Defendant Trapp has filed a motion for reconsideration of the Court's Order of September 7, 2005 and a motion to dismiss this case. Defendant Trapp's motions state no substantive basis upon which to dismiss this case. In addition, his motions identify no legally cognizable prejudice arising from the prior stays of this action or the Court's recent lifting of the stay. At all times relevant to this action, Trapp has had the right to request a lifting of the stay and to file a response to TSBC's Complaint. Instead, Trapp has been content to await a determination of the USTIF regarding potential reimbursement for costs associated with the clean-up of the premises previously occupied by Trapp.

Upon the expiration of prior stays entered in this case, Trapp was free to file a response to the Complaint. Instead, he acquiesced in the further stay of this proceeding. All

parties had hoped that the USTIF would reach a determination that would potentially facilitate a settlement of this case. Unfortunately, this has not occurred. Accordingly, the defendants should proceed with the filing of responses to the Complaint and the matter should proceed towards resolution. BP recognizes that the parties must now address the merits of this dispute and has agreed to file an answer to the Complaint on or before September 26, 2005.

TSBC's Complaint has been pending since September of 2003. The stays previously entered by the Court have deferred the defendants' obligations to respond to the Complaint and preserved their resources pending possible resolution of this case. Defendant Trapp should not be permitted to take advantage of a process that was designed in principal part to benefit him. Instead, this case should be decided on its merits after Trapp properly responds to the Complaint. Having sustained no prejudice as a result of the prior stays, Trapp has no basis for seeking the dismissal of this action.

IV. CONCLUSION

For the foregoing reasons, plaintiff, TSBC, and defendant BP respectfully request that the Court deny defendant Trapp's Motion for Reconsideration and Motion for Dismissal.

Respectfully submitted,

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